STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

AMDEBIRHAN ABDERE ALEMU,

Defendant-Appellee,
_____/

Supreme Court
No. _____

Court of Appeals
No. 316422

Kent County Circuit Court
No. 13-00380-FH

APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

The People seek this Honorable Court's review of the July 7, 2015, unpublished majority opinion of the Court of Appeals, vacating the trial court's sentence and remanding for further proceedings. The People ask that this Court either peremptorily reverse the opinion of the Court of Appeals, or grant leave so that this Court can provide clarification on how to apply the abuse of discretion standard in the context of a trial court's decision to deny a defendant treatment under MCL 333.7411 or comparable deferral proceedings.

STATEMENT OF QUESTION PRESENTED

DEFENDANT PLED GUILTY TO A MISDEMEANOR COUNT OF POSSESSION OF MARIJUANA FOR DISMISSAL OF A FELONY COUNT OF POSSESSION WITH INTENT TO DELIVER MARIJUANA. THE TRIAL COURT DECLINED TO GRANT DEFENDANT A FURTHER CONCESSION OF DEFERRED SENTENCING UNDER MCL 333.7411. THE COURT OF APPEALS MAJORITY FOUND THAT THE TRIAL COURT'S REASONING CONSTITUTED AN ABUSE OF DISCRETION. DID THE COURT OF APPEALS ERR IN ITS APPLICATION OF THE ABUSE OF DISCRETION STANDARD?

The People would answer: Yes.
Defendant presumably would answer: No.

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STATEMENT OF APPELLATE JURISDICTION

This case was heard on an application by leave granted (May 1, 2014 order of the Court of Appeals) of the trial court's sentencing of Defendant following his plea-based conviction for Possession of Marijuana in the Kent County (17th) Circuit Court. The Court of Appeals opinion was entered on July 7, 2015. This application is being filed within 56 days of the Court of Appeals opinion, as required by MCR 7.302(C)(2).

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

AMDEBIRHAN ABDERE ALEMU,

Defendant-Appellee,

_____/

Supreme Court
No. _____

Court of Appeals
No. 320560

Kent County Circuit Court
No. 13-00380-FH

APPLICATION FOR LEAVE TO APPEAL

NOW COMES Plaintiff-Appellant, the People of the State of Michigan, through the Prosecuting Attorney for the County of Kent, and pursuant to MCR 7.302, hereby applies for leave to appeal the July 7, 2015, majority decision of the Michigan Court of Appeals, vacating the sentence of the Kent County Circuit Court and remanding the case for further proceedings. The issue involves the application of the "abuse of discretion" standard in evaluating the decision of a trial court to decline to sentence a person under the terms of MCL 333.7411. A copy of the Court of Appeals majority opinion, and the dissenting opinion of Judge Markey, is being filed with this application. The opinion of the Court of Appeals is unpublished.

The People submit that this case presents the following meritorious grounds under MCR 7.302(B) for granting leave to appeal:

1. The issue is one of major significance to the jurisprudence of the state. While the abuse of discretion standard has been oft repeated, its application in the context of a deferred sentencing scheme apparently needs clarification. The dissenting judge found several reasons that this was

not an appropriate case to find an abuse of discretion, while clearly the majority believed the information before it was sufficient to declare that the trial court's reliance, in part, upon the availability of a motion to set aside was just such an abuse of discretion. Given the number of deferral-type proceedings potentially available to a defendant [such as MCL 333.7411 (controlled substances); MCL 769.4a (domestic assault), MCL 762.11 *et seq* (HYTA); MCL 750.350a(6) (parental kidnapping)], the People believe that the standard of review for the propriety of such sentences is likely to recur in the courts of this State.

2. Additionally, the People submit that the decision is clearly erroneous and conflicts with the decisions of this Court and other decisions of the Court of Appeals defining what constitutes an abuse of discretion. The reasoning adopted by the majority in reality substitutes its opinion for that of the trial court rather than providing the required deference, which this Court has repeatedly held is not a proper application of the abuse of discretion standard.

There is one important caveat to the People's Application for Leave to Appeal, however, that this Court needs to consider. At the time of Defendant's plea, the People agreed to take no position on whether Defendant should receive treatment under MCL 333.7411 (Pl Tr, p 6). The People believe they have complied with that obligation by, in fact, taking no position on whether Defendant should receive treatment under that statutory provision at either of his sentencing hearings in front of the trial court. The People believe that advocating for the validity of a court order or requesting clarification of the application of a standard of review in upper-level appellate proceedings is not a breach of the agreement to take no position on whether Defendant should receive treatment under §7411. If this Court disagrees, however, the People respectfully submit that this Court should dismiss the People's application and have the matter returned to the trial court for further proceedings consistent with the opinion of the Court of Appeals.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant was arrested for and charged with Possession with Intent to Deliver Marijuana for an incident occurring on December 23, 2012 (Original Felony Information). He pled guilty on March 26, 2013, to an amended misdemeanor count of Possession of Marijuana, with the People further agreeing to take no position on any request for sentencing pursuant to MCL 333.7411 (Pl Tr, 6, 8-9).

According to the PSI, the Grand Rapids Police found Defendant parked in his vehicle talking on his phone in the Cambridge Square Apartment complex (PSI, 2). The officer approached Defendant and asked him why he was there (PSI, 2-3). The officer saw a box of clear plastic sandwich baggies in the car (PSI, 2). Defendant was arrested for trespassing, and then consented to a search of his car; a glass jar containing marijuana was found, along with a plastic bag with more marijuana, and a digital scale (PSI, 2). Defendant denied he was there to sell marijuana, but only to share it with some friends (PSI, 2).

On May 23, 2013, the trial court sentenced Defendant to one year of probation and a $1,000 fine, while declining to give him treatment under §7411 (S Tr, 8-9).[1] Prior to sentencing, Defendant told the trial court that the marijuana was an amount he was going to share with his friends over the holiday (S Tr, 5), that he had a box of sandwich bags that he used "to put the marijuana whenever I leave the car instead of bringing what I have with me" (S Tr, 6), and a digital scale (S Tr, 6). The trial court, following the colloquy, stated:

> Because I think the more that I ask you, the less credible you become. . . I just am totally incredulous this University of Michigan student who is bright and capable is trying to tell me that he has a glass jar with a pound of marijuana and a box of sandwich baggies that's open, a digital scale in his door, and he's just doing this to decant a small, usable amount anytime he goes from home to home to visit friends over the holiday. Now, that doesn't seem like simply just taking a small amount just to use with your friends. It seems to me in this apartment complex where you were, that you were providing a means to dispense

[1] The People, as agreed, took no position on Defendant's request (S Tr, 5).

> to the willing. That's how it comes across to me. Now, I have to determine credibility. Maybe I'm wrong. I don't believe you. (S Tr, 7)

Defendant filed a motion for resentencing, which was heard by the trial court on February 14, 2014, arguing that the trial court improperly relied on a statement in the Presentence Investigation Report that Defendant possessed approximately a pound of marijuana when, in actuality, he only had approximately 23 grams (M Tr, 4).[2] The People again took no position (M Tr, 3-4). The trial court verified that, regardless of the amount possessed, Defendant had a digital scale with him at the time of his arrest (*Id.*, 8). The trial court ultimately denied the motion for resentencing, stating:

> I believe incentives matter. And with regard to section 7411, my decision not to grant it was not based on any quantity stated or any colloquy between the defendant and myself. My decision not to grant it was the recognition that at twenty years of age, this young man had no prior criminal record, that the amount involved – he had no history of trafficking in drugs or narcotics or any other kind of substance abuse, had an education that was well grounded and the potential of a bright future.
>
> Incentives matter, as I say, and I'm saying now that which I had in my mind when I fashioned the sentence was to give to the defendant the opportunity for expungement under a different section of law, namely; the general statute which requires a five-year period of abstinence, except for minor offenses, and the subsequent consideration presuming that he continues in the path that he has chosen.
>
> So I will grant this relief to the petitioner:
>
> An order directing that the probation presentence report be amended to reflect the accurate amount of the drug in the defendant's possession on December 23rd of 2012; and second, that -- and no other relief. The defendant may apply for expungement, provided that he qualifies under the separate statute which relates to crimes committed at a young age and no prior offenses subsequently except for two minor offenses. So I guess in essence, Mr. Alemu has two more opportunities to re-offend that wouldn't disqualify him, provided the statute doesn't change. But in that regard, those paths that he started will be shown to be a permanent path rather than giving him the opportunity to – giving him the opportunity to earn it as a matter of fact as opposed to granting it when his future is still uncertain.

[2] The People concede that the lab report indicates the marijuana found in the glass jar weighed 21.24 grams while the marijuana found in the plastic bag was 2.37 grams.

> Second thing is with regard to the length of the probation period, I have no objection to early release if the probation department recommends it, but it will have to come from them. They, after all, are charged with his supervision. (M Tr, 12-14.)

Defendant sought leave to appeal in the Court of Appeals, which, as noted *supra*, was granted. On July 7, 2015, the Court of Appeals vacated the trial court's sentencing and remanded for further proceedings, holding that the trial court's comments about "giving him the opportunity to earn it as a matter of fact [through a motion to set aside] as opposed to granting it when his future is still uncertain" evidenced an abuse of discretion because "[i]n order for a defendant to have the proceedings dismissed without an adjudication of guilt under §7411(1), he or she must 'earn it.' . . . [T]he trial court misapprehended the process for a deferred adjudication under the statute." Slip op at 4-5. Judge Markey dissented, stating "I do not believe a full review of the record supports a finding that the trial court's holding constituted an abuse of discretion – a high hurdle for this court to achieve." Dissent, slip op at 1.

ARGUMENT I

DEFENDANT PLED GUILTY TO A MISDEMEANOR COUNT OF POSSESSION OF MARIJUANA FOR DISMISSAL OF A FELONY COUNT OF POSSESSION WITH INTENT TO DELIVER MARIJUANA. THE TRIAL COURT DECLINED TO GRANT DEFENDANT A FURTHER CONCESSION OF DEFERRED SENTENCING UNDER MCL 333.7411. THE COURT OF APPEALS MAJORITY FOUND THAT THE TRIAL COURT'S REASONING CONSTITUTED AN ABUSE OF DISCRETION. THE COURT OF APPEALS ERRED IN ITS APPLICATION OF THE ABUSE OF DISCRETION STANDARD BY SUBSTITUTING ITS OPINION RATHER THAN PROVIDING THE REQUIRED DEFERENCE TO THE TRIAL COURT.

Standard of Review. MCL 333.7411(1) states that "the court, without entering a judgement of guilt with the consent of the accused, may defer further proceedings and place the individual on probation." Because the statute affords the trial court discretion regarding whether to defer the proceedings, the Court of Appeals correctly noted that the review should be for an abuse of discretion, although the case cited, *People v Ware*, 239 Mich App 437, 441; 608 NW2d 94 (2000) did not actually state the standard of review. Comparable deferral proceedings, however, have explicitly stated that review is for an abuse of discretion. See *People v Khanani*, 296 Mich App 175, 177-178; 817 NW2d 655 (2012) (assignment under HYTA); *People v Bobek*, 217 Mich App 524, 531; 553 NW2d 18 (1996) (discharge from HYTA reviewed for an abuse of discretion). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

While the trial court's decision is reviewed for an abuse of discretion, "[t]his Court has historically cautioned appellate courts not to substitute their judgment in matters falling within the discretion of the trial court, and has insisted upon deference to the trial court in such matters." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 228; 600 NW2d 638 (1999). As

such, it is error if the Court of Appeals fails to provide proper deference and instead substitutes its own opinion for that of the trial court. See, *e.g.*, *People v Burns*, 493 Mich 879; 821 NW2d 787 (2012); *Insurance Co of North America v Schuneman*, 373 Mich 394, 397; 129 NW2d 403 (1964). As such, the People submit that the proper standard of review for this Court of the Court of Appeals decision should be de novo, just as a circuit court's decision to deny a motion to quash bindover under an abuse of discretion standard for the lower court is reviewed de novo by a higher court. See, *e.g.*, *People v Herndon*, 246 Mich App 371, 393; 633 NW2d 376 (2001).

Discussion. The majority opinion of the Court of Appeals improperly substituted its judgment for that of the trial court.

As the trial court noted, one of the things it noted in discussing how "incentives matter" was that the general statutory provision on setting aside a conviction requires a five-year period of abstinence (M Tr, 13); see MCL 780.621(5): "An application [to set aside a conviction] shall only be filed 5 or more years after [the completion of the sentence in various ways]." Because Defendant had pled guilty to a misdemeanor count of Possession of Marijuana, he was only subject to a maximum period of probation for two years. See MCL 771.2(1): "[I]f the defendant is convicted for an offense that is not a felony, the probation period shall not exceed 2 years. . . . [I]f the defendant is convicted of a felony, the probation period shall not exceed 5 years." The Court of Appeals failed to acknowledge this factor that was articulated by the trial court or to give it any weight. Nonetheless, the timeframe for wanting to make sure that defendant had actually earned the relief requested was articulated by the trial court for why it felt a sentence under MCL 333.7411 was insufficient in this case, not merely that Defendant needed to demonstrate his suitability for such a disposition in the abstract. Admittedly, the trial court did not explicitly reference the two year time limit on probation for a misdemeanor possession of marijuana charge, but it is clear that

the trial court wanted a longer period of behavioral compliance by Defendant that than he could obtain with the sentencing option requested. Because the Court of Appeals failed to acknowledge this aspect of the trial court's rationale, it failed to afford the trial court proper deference. While the majority clearly believes Defendant was an appropriate candidate for treatment under §7411, that was not the question they were supposed to be answering. Applying the abuse of discretion standard appropriately, the Court of Appeals should not have stepped into the shoes of the trial court and made such the determination in the way that it did. It erred in its conclusion that the trial court abused its discretion.[3]

Further, as the dissenting judge in the Court of Appeals stated: "The trial judge in this matter is extremely experienced and certainly well familiar with the applicable law. . . . We do not have the ability to perceive the subjective factors that may also affect a judge's sentencing, such as demeanor, attitude, voice inflections, etc., which is another reason why finding an abuse of discretion in a situation such as this is even more difficult." Dissent, Slip Op at 1. The majority's narrow focus on the phrase "incentives matter" failed to accord the proper deference to the trial court's decision making process, and resulted in an erroneous decision.

If this Honorable Court agrees with the People, a peremptory reversal would be appropriate. If this Honorable Court believes that additional clarification of what the abuse of discretion standard means in a case such as this one is required for the benefit of the bench and bar, the People submit that Leave to Appeal should be granted.

[3] The majority also remanded the case for an administrative correction of information in the PSI about the quantity of marijuana that was seized. If such correction has not already taken place, the People are not challenging that holding.

CONCLUSION

RELIEF REQUESTED

WHEREFORE, for the reasons stated herein, the People respectfully pray that this Court either peremptorily reverse the decision of the Court of Appeals to the extent it found an abuse of discretion in denying Defendant's petition for treatment under MCL 333.7411, or grant our application for leave to appeal; and that upon plenary review, the Court reverse the decision of the Court of Appeals and remand this matter to the Circuit Court for the County of Kent solely for the administrative task of correcting the Presentence Investigation Report.

Respectfully submitted,

William A. Forsyth (P 23770)
Kent County Prosecuting Attorney

Dated: September 1, 2015

By: /s/James K. Benison
James K. Benison (P 54429)
Chief Appellate Attorney